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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner,*

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents Concede Split Is Illegal

The case has been considerably simplified by the numerous concessions in the briefs of the respondents. In effect, they concede that even an all-inclusive split would be illegal; they now contend only that Viking has no standing to attack the instant split because Viking was not and could not be injured. Since only the brief of the respondent-distributors (excluding 20th Century Fox, who filed a separate brief)[1] dis-

[1] The petitioner has adopted the following abbreviations to apply to the various briefs: Brief for respondents MGM, Columbia, United Artists, Universal, Paramount, and Warner Bros.—MGM Brief; Brief for respondents Twentieth Century Fox and Fox Philadelphia—Fox Brief; Brief for Goldman Theatres—Goldman Brief; Brief for Stanley Warner—Stanley Warner Brief; Main Brief for Petitioner—Petitioner's Brief.

cusses the petitioner's argument that the split is a division of the market, *per se* illegal, petitioner will address itself on this point to their discussion.

These respondents concede that a split between exhibitors, whether all-inclusive or not, is illegal if not consented to by the distributors involved. MGM Brief p. 33. They concede that a non-consenting distributor could properly rely upon *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, and subsequent division of the market cases. *Id.* at 33, 46-47. They specifically concede that the violation would be *per se*, for as in the division of the market cases, there would be "an obvious and properly *presumed* adverse effect [on prices]. . . ." *Id.* at 47. (Emphasis added.)

The respondents also acquiesce in *Twentieth Century Fox Film Corp.* v. *Goldwyn*, decided Jan. 24, 1964, 9th Cir. No. 17,725, affirming 194 F. Supp. 507 (N.D. Cal. 1961), decided since the petitioner filed its brief on the merits in this case. MGM Brief, p. 33. In *Goldwyn*, however, a producer rather than a distributor was the aggrieved party, and, as the respondents describe it, the split in that case was held illegal "expressly because he [the producer] had not consented to it." *Id.* at 33. By acquiescing in *Goldwyn*, the respondents necessarily concede that the splits in the case at bar are illegal *per se* and will be so declared any time a producer chooses to assert his rights under the Sherman Act.

The sole issue remaining, therefore, is whether Viking has standing to attack this illegal agreement—i.e., whether Viking is an aggrieved party.

2. Basis of Illegality for All Splits Is Sub-Market Monopolization

Although the respondents concede the illegality of the split, they inconsistently dispute petitioner's theory of sub-market monopolization, presumably because it is the primary step towards proving Viking's injury. Petitioner's theory, however, follows logically from respondents' concessions.

Using the respondents' example of the all-inclusive split to which the distributors *do not* consent, the basis of *per se* illegality is clear. An all-inclusive split creates an absolute division of the market among exhibitors granting each a complete monopoly over the films on its split vis-a-vis the distributors. The distributors' only choice is either to license at the exhibitor's terms or to withdraw the picture from that market. And by favoring other distributors, the exhibitor can effectively blackout all the pictures on its split belonging to one distributor. Due to the exercise of this monopoly power, the exhibitors could not avoid lowering prices if they tried—i.e., the "obvious and properly *presumed* adverse effect" expected.

What happens then when one or more additional non-participating exhibitors are added to the market—i.e., a non-all-inclusive split as we have in this case: The answer as stated in the Report of the *Attorney General's National Committee to Study the Antitrust Laws* (1955) p. 26 is very simple:

> If a large number of strong competitors remain despite the contract [dividing the market], no contracting party profits from elimination of even a significant competitor.

And how is this point of "no profit" to the contracting parties measured? Again very simply. As the lead-

ing case on Section 1 restraints of trade, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-501, states: A restraint of trade, with specific reference to a division of the market, becomes illegal when "the restraint is shown to have or is intended to have an effect upon prices. . . ." *Id.* at 501.

The respondents do not dispute the admissions of Mansell of Warner Bros. and Goldman that the split system in the case at bar had a substantial affect on market prices. Petitioner's Brief, pp. 6-7, 10-11. This can only mean that the respondent-exhibitors retained sufficient power within their split markets to keep all the advantages on an illegal all-inclusive split. This is the essence of the petitioner's theory of sub-market monopolization.[2]

3. Respondents Could Not Avoid Injuring Viking

Petitioner contends that the respondent-exhibitors' power to control prices could not help but benefit them in competing with Viking. This has been shown a number of ways. First, Mr. Goldman testified that the purpose of the split was to eliminate "economically disastrous" competition with Stanley Warner. Viking obtained no such advantage. Whichever side it chose to bid on, it still had to meet the "economically dis-

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[2] The reason for *per se* rules under the Sherman Act is that certain types of restraints inevitably create the *power* to affect the market price structure. As this Court said in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397:

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices . . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints . . . .

It is admitted that the splits put such power into the hands of the respondent-exhibitors in this case.

astrous" competition of either Stanley Warner or the equally large Goldman. Unavoidably, therefore, the primary benefit for which Goldman bargained could not flow to Viking.

Second, due to their enhanced bargaining power within their sub-markets, the respondent-exhibitors could obtain price advantages not made available to Viking. Thus, they demanded and received between 13 and 27 film rental adjustments per theater, a form of rebate on the contract price, while Viking could obtain only two.[3]

Third, in the Petition for Certiorari, pp. 10-13, the petitioner demonstrated that the split gave the respondent-exhibitors lulls while Viking was out of the market committed to a picture, during which time they could obtain pictures with virtually no competition whatsoever.[4] Only this theory will satisfactorily explain

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[3] Viking requested adjustments on 19 first-run pictures which the respondent-distributors rejected. R. 298-308.

[4] The effect of the other four independents on the market was negligible. Of these four, the Studio and World can be ignored. Jay Wren, Viking's general manager, testified that these theaters exhibited almost exclusively "art products or reissues or repeats of films that had fared well." Between January 1955 and November 1956, the Studio exhibited only two first-run films and the World five. R. 954. The limited seating capacity of the remaining two (650 and 493 respectively) generally precluded strongly competitive bids on films with mass audience appeal. On such few occasions as they secured such films, they required very long runs to compile adequate grosses, thereby taking themselves out of the market altogether for many weeks or months. In tacit recognition of these economic facts of life, Goldman described the competitive situation as follows when he sought the split with MGM:

> There were no other theatres operating here but the Warner Theatres and the Fox and the Viking Theatre wasn't in existence at the time .... R. 1634.

See also R. 1751.

why Viking had to pay 20 per cent more in film rental than the perfectly comparable Midtown Theatre owned by Goldman. See pp. 6-9 *infra*. For if Viking and Midtown put in comparable bids when competing as respondents allege, then the Midtown had to get a significant price break when they were not competing.

All three of these competitive advantages over Viking flow to the respondent-exhibitors solely because of the split system. They are an inherent and unavoidable part of a successful division of the market by which Viking is necessarily aggrieved.

4. Viking Was Damaged

All the respondents pitch their heaviest reliance on the allegation that the petitioner failed to show that it was damaged. The demonstration of damage is easily made by comparing Viking with Goldman's Midtown.

The two theaters are perfectly comparable. The Midtown had 994 seats to the Viking 1017. According to Ted Minsky, a Stanley Warner film buyer, the two theaters were equally well located, although the Midtown had a slightly better access to the downtown pedestrain flow. R. 1604-05. Both theaters had been recently remodelled: the Midtown in 1951, R. 1820, and the Viking in the spring of 1954, Petitioner's Brief p. 12. Both theaters preferred exhibiting high-quality pictures. Both theaters used almost identical allowance figures for license agreements based on a house expense allowance: the Midtown $5,000 per week and the Viking $4,900. R. 1511.

Mr. Beattie, however, the Goldman film buyer, felt that all Goldman theaters had one significant advan-

tage: the "showmanship" of its management. Showmanship he defined as the ability of "selling . . . a picture to the public"—"sparking the public . . . to come to your theatre"—increasing "the business on the picture." R. 1821. On this basis Mr. Beattie would expect the Midtown to do more business than Viking at the box office, compile higher gross receipts, and therefore be in a position to induce the distributors to accept a smaller percentage as film rental.

The petitioner's damage schedule shows, however, that such was not the case. R. 2067. The total gross receipts of the Midtown and the Viking are virtually identical. The Midtown earned $1,239,419, and the Viking earned $1,200,357. This means either that Mr. Beattie's talk of "showmanship" is simply puffing, or that the Viking is in every other way a better theater than the Midtown.

The big difference between the theaters was not the business they did at the box office, but the amount they paid as film rental to the distributors. The Midtown paid $521,825 whereas the Viking paid $630,487, a difference of $108,662. R. 2067. One reason for such a substantial difference is not difficult to trace. The record shows that Viking was required to pay $122,610 in guarantees over and above the film rentals earned on seven of the fourteen films it had to guarantee. R. 2644-48. The need to make such guarantees is one the petitioner's primary claims of discrimination. Petitioner's Brief p. 19. For this reason the difference in film rental paid by the Midtown and Viking forms one of several valid bases for proving damage, and constitutes a *prima facie* showing of injury.

5. Guarantees Prove Price Discrimination

In concluding that Viking did not pay higher film rentals than the respondents, the Court of Appeals conveniently ignored guarantees:

> "The plaintiff's computation of gross film rental paid by it includes the total of six guarantees, each of which was considerably higher than the earned film rental .... Absent these guarantees, the comparisons are of little or no significance." R. 2787.

However, this very exclusion runs contrary to the testimony of the respondents that guarantees are one of the primary elements in the film rental price structure. When Mr. Beattie was asked Goldman's policy on making guarantees, he replied:

> "A. We did not give guarantees as a practice.
>
> "Q. Why was that?
>
> "A. We felt that guarantees had a—bidding and putting up guarantees had a tendency to—to raise film rental, cost of pictures, cost of operation. We felt that it was in our judgment better not to put up guarantees, if possible, or not bid if it could be avoided." R. 1819.

When asked how he could avoid putting up guarantees, Mr. Beattie replied:

> "We felt that our theatres were our guarantees, our organization, showmanship, which we believe we have acquired over the years.
>
> "We felt that we had established theatres in ... prime locations ....
>
> "We believed we were the best operators.
>
> "We had new theatres in town....
>
> "We felt with ... the record we had shown in all these theatres through time it was not necessary to put up guarantees." R. 1820.

While this may sound persuasive, it cannot get around the unalterable figures that the Midtown was unable to outdraw the Viking at the box office—i.e., if Goldman had all this attraction, then so did Viking. And under Mr. Beattie's own analysis, the fact that Viking had to include guarantees on 14 of the 32 films it played is equivalent to saying that the Viking had to offer higher prices than the comparable Midtown. The price break to Midtown is just the result which *Apex Hosiery*, the *Att'y Gen. Report on Antitrust*, and the petitioner's theory of non-competitive lulls would lead one to expect.

Although the respondent-distributors claim that both Fox and Stanley Warner offered many guarantees, they have managed to come up with only nine referred to in the record out of the 332 films these two exhibitors played during the period.[5] MGM Brief p. 16, Stanley Warner Brief p. 23.

6. Respondents Concede Evidentiary Issue

The respondents have graciously abandoned the cases upon which they relied below to limit petitioner's evidence to the 87 films in which it expressed an interest.

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[5] Of these nine, three were guarantees offered by Fox on films which it received and on which it apparently paid something over and above earned film rental. R. 2753-54. Four were offers made by Stanley Warner on films it received, of which it had to pay on only one. R. 1093. The other two were Stanley Warner offers on films it lost to Goldman. If the issue of guaranteed offers on films lost is included, petitioner would have to add 14 instances where it offered a guarantee but lost the film to a respondent-exhibitor who had not offered a guarantee. Paramount: 2399; 2400; 2401; 1057-58; 1034-35. Warner Bros.: 2439; 2441; 2449; 2453; 2461; 2462; 1071-72. Columbia: 2467; 2468; 2469; 2484; 2486. United Artists: 2487; 2488; 2490; 2492. Twentieth Century Fox: 264-65. MGM: 266-68. Universal: 174-75.

As the petitioner has shown, these cases have no relevance. Petitioner's Brief, p. 45 n. 19. That the trial court relied on them, however, is all too clear, for the trial judge stated:

> Although this precise point has not been raised heretofore in a similar case to the present one, to me the rationale of the authorities submitted by the defendants is clearly applicable. R. 217.

Presumably, respondents therefore concede that the trial court ruling was erroneous.

Although the respondents attempt to play down the importance of the ruling, MGM Brief, p. 63, the record contradicts them. Legal argument on the ruling and discussion of its application to specific offers of proof cover 74 pages of the record. R. 216-18; 1009-10; 1038-54; 1558-60; 1575-89; 1766-68; 1772-73; 1796-1803; 2011-26; 2239-43. Without question, this was the most hotly disputed legal issue at trial, and it is yet to be reviewed.

Rather than meet the issue here, the respondents adopt the alternative grounds suggested by the Court of Appeals. These grounds, however, are as weak as respondents' abandoned cases. For example, the respondents and the court below reject the film rental adjustment comparison on the ground that they were summary, did not distinguish between distributors, and did not go into the surrounding circumstances. R. 2784; MGM Brief, p. 60-61. However, as a later attempt to introduce detailed evidence on just such an adjustment shows, R. 2240-42, all these new objections would have been cured if evidence supporting the offers of proof had in fact been admitted. In other

words, the respondents new ground of exclusion is itself a by-product of the trial court's original error.

7. Film Rental Adjustments

Even the respondents realize the weakness of their new evidentiary argument and have stretched the record beyond recognition to rebut the film rental adjustment issue on the merits. They attempt to show that Viking received adjustments equal in amount to respondent theaters. MGM Brief p. 21. The true film rental adjustment picture, however, in numbers and amounts is as follows, R. 1049-50:

	Number of Adjustments		Amount of Adjustments	
Exhibitors	Total	Average Per Theatre	Total	Average Per Theatre
Goldman	48	16	$77,079	$25,693
Stanley Warner	82	27.3	71,848	23,949
Fox	13	13	27,147	27,147
Viking	2	2	1,930	1,930

To the Viking's number and amount, the respondents have tried to add a $1,336 adjustment on the "Wizard of Oz." This film was a re-release, not a first-run picture, and is therefore not involved in this suit. R. 43. They have tried to add the $15,000 offer which Universal retracted. They then compare this new bogus total to what some of their theaters actually received.

8. The Universal Blockbooking Incident

The respondents' reliance on the alleged $15,000 adjustment offer warrants a further consideration of the Universal blockbooking incident. First, as a single instance of discrimination, this incident has always been in the case. R. 212-214. Second, Universal insisted on the "package" of four films even though peti-

tioner was interested in only one and had only screened two. R. 206-09.[6] Third, Universal insisted on a prohibitive and discriminatory $85,000 guarantee on the package so that it could justify the deal to Goldman and Stanley Warner. R. 209. However, it promised a later adjustment. *Ibid.* Fourth, when Viking sought an adjustment after disastrous losses, Universal attempted to use this lever to make petitioner drop this suit. The record shows that the guarantee was $39,048 in excess of the earned film rental. R. 2605. Universal first offered a $15,000 adjustment which was rejected because it did not begin to cover the losses due to the guarantee. R. 222, 500. When a meeting was set up with three Universal officials for further negotiation, R. 222, 302-03, Mr. Dana of Universal withdrew the $15,000 offer because of the pending antitrust action. R. 303. In other words, as punishment to Viking for bringing and continuing this action, Universal withdrew from further negotiations of a promised adjustment of a discriminatory guarantee on a blockbooked package.

9. Playing Time Adjustments

The respondents stretch the record on playing time adjustments just as on rental adjustments. The record shows that Viking received only four playing time adjustments, all from MGM. In each case MGM voluntarily agreed to the adjustment to permit another *MGM* picture to go in immediately. In three of the four, the minimum period had already played and

[6] It was well known in the industry that petitioner refused to bid on pictures it had not screened, R. 209, and these two were the only unscreened pictures it ever played. On several occasions, petitioner carried on lengthy disputes with distributors who asked for bids but refused a screening. R. 2627; 2670-75; 2680-81; 2717.

MGM waived only its rights under the holdover clause.[7] These adjustments benefited both parties since it kept MGM pictures at their highest earning turnover.

By comparison, the record shows Goldman regularly took unilateral playing time adjustments at the expense of the distributor. Mr. Beattie of Goldman testified that the Randolph Theatre normally terminated the run of a picture when the weekly gross dipped to $10,000. R. 1827-28. The context of this remark was to explain why he unilaterally breached the United Artists contract for "Summertime" after only four of the minimum eight weeks had run, in order to put in Warner Bros.' "McConnell Story." *Ibid.* This explanation makes sense, of course, only if the breach was typical of Goldman's normal policy.[8]

The difference between Goldman's unilateral policy and the four Viking-MGM transactions is dramatized by the "McConnell Story" incident as described in Petitioner's Brief, pp. 23-24, and the reply of the respondents. By footnote, the respondents conclude that the incident shows only that "the distributor was able to get the desired playing time from Goldman (the very valuable Labor Day weekend), whereas Viking could not have supplied it." MGM Brief p.

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[7] A typical holdover clause states that if a picture earns over a certain amount in the second to last week, then the picture will be held for an extra week. E.g., R. 2507.

[8] Petitioner did not offer statistics on playing time adjustments in the trial court. The record shows, however, that in addition to the above, Goldman took a playing time adjustment on six of the seven Universal pictures grossing over $19,000 that he played. R. 2603-05. He took "Romeo and Juliet" off the screen after ten days although he had signed a contract for a minimum of six weeks. R. 2242; 2496.

57 n. 53. However, when it is remembered that Goldman was committed to "Summertime" for two weeks longer than Viking was committed to "Not as a Stranger" (both United Artists pictures), the statement is tantamount to an admission that the distributor Warner Bros. knew Goldman could breach his United Artists contract with impunity whereas Viking could not. In other words, it was industry knowledge that Goldman unilaterally terminated playing time commitments without regard to contract terms.

10. Seating as a Measure of Market Power

All the respondents pounce upon the remark of Jay Wren, Viking's general manager, that seating capacity has no effect upon a theater's ability to enter a competitive bid. R. 447. They conclude *ipso facto* that seating capacity cannot be a valid measure of market power. The fallacy, however, is the respondents' not the petitioner's.

The question of seating capacity as a factor in bidding was first brought up by Mr. Nizer on cross-examination of Jay Wren. R. 446. Mr. Wren asked if he could give a full explanation. Mr. Nizer said no, they would return to it another time. *Ibid.* They never did. From there Mr. Nizer led Mr. Wren to the comparison of Radio City Music Hall to a 600 seat theater. R. 447. The context, as always, was a theater's ability to enter a competitive bid on a single picture.

On redirect, Mr. Wren was permitted his explanation. R. 961-63. By a series of comparisons, he pointed out that Viking could bid competitively with a theater several times its size simply by offering to play a picture for a longer time. Thus, while the Mastbaum

(4387 seats) earned a total gross of $135,000 on "Mr. Roberts" (national film rental over 7 million) in six weeks, Viking earned a total gross of $166,000 on "Not as a Stranger" (national film rental over 6 million) in 12 weeks. R. 962-63. And the second highest gross for any picture at any theater in Philadelphia during the period was obtained at the Midtown, the smallest of all the respondent theaters, on a fifteen week run. R. 964. The public adjusts to the longer runs at the smaller theaters.

The corollary to Mr. Wren's position is, of course, that in the long run a smaller theater plays fewer pictures of the same quality than its bigger competitor or the same number of pictures but of less quality. Both of these alternatives are borne out by the record. The record shows, R. 894-95; 1040; 1048; 2067:[9]

Theater	Seating	Pictures Played	Quality by Av. Nat'l Film Rental	Total Theater Gross
Viking	1017	31	$1,515,000	$1,200,357
Midtown	994	39	1,244,000	1,239,419
Goldman	1188	68	1,260,000	1,562,481
Randolph	2020	27	3,020,000	2,097,366

Thus, it is perfectly consistent to say that seating capacity has a negligible effect on a theater's ability to bid on a single picture, but that over a long period, such as the 123 weeks in this suit, the larger theater

[9] The above chart shows that while the Viking and Randolph played roughly the same number of pictures during the period, the Randolph played pictures of twice the quality and grossing power and compiled a total gross $800,000 in excess of Viking. The chart also shows that the Goldman Theatre played twice the number of pictures but of slightly less quality than the Viking and compiled a gross $360,000 in excess of the Viking. Indeed, the Goldman is the best example of a theater that successfully programmed a very high turnover of poor pictures. See Petitioner's Brief p. 25.

has proportionally greater market power due to the increased number and/or higher average quality pictures it can license.

11. Schwalberg Agreement Is Conclusive of Illegal Restraint and Illegal Intent

The factual analysis already reviewed clearly presents a jury issue. The Schwalberg agreement makes the case *a fortiori*. Within its four corners it documents both conspiracy and illegal intent, the only two factors needed for a Section 1 violation. *United States* v. *Griffith*, 334 U.S. 100.

Respondents belittle this agreement as merely a method of handling a difficult problem-child—Mr. Goldman. They state:

> "This was on distributors' solution to a problem with one exhibitor who refused to submit formal bids—a solution which gave him a chance to submit his offer, but only if exhibitors who did submit formal bids had offered inacceptable terms." MGM Brief pp. 28-29.

This "problem," however, was one completely of Paramount's own making since Goldman himself states he could not have refused to bid if it weren't for the split eliminating competition with Stanley Warner. Petitioner's Brief p. 7.

Moreover, this was not just Paramount's problem. There was evidence that respondent-distributors generally followed the Schwalberg formula. The respondents have not attempted to rebut the two examples where Warner Bros. went to Goldman, and gave him a picture on his split after the independents had bid, although Goldman had not. The exclusivity of the arrangement is self-evident from the fact that the rejection notices on the bids were held up until the Gold-

man deal was completed. Petitioner's Brief pp. 22-23. United Artists sent out written requests for the submission of written bids. However, this same evidence shows that they were sent only to the independents and Fox—not to either Goldman or Stanley Warner. R. 2596-97, 2599. Clearly the latter two were not even expected to bid. Midway in the period involved, however, United Artists apparently talked to their lawyers, for on September 7, 1955, the Philadelphia branch manager informed the home office by letter: "Please be advised that we have resumed sending bid letters to the first-run Goldman and Stanley Warner Theatres in Philadelphia." R. 2598. In the the case of Columbia and MGM, the record shows that there were pictures where only Viking and the independents submitted bids, where these bids were rejected, and where the picture was licensed to Goldman without further negotiations with Viking. R. 194, 223, 1507-09. When Viking first entered the market, it asked Universal whether it had any pictures available. R. 1531-34. Universal said no on October 26, 1954. Two weeks later, Universal licensed four pictures to Goldman without further notice to Viking. R. 2755-63.

Without the split, of course, none of these agreements and practices could have existed. Exclusivity could not have been offered to both Goldman and Stanley Warner, and Goldman could not have refused to bid. And even if Stanley Warner did bid more often than Goldman, its acquiescence in the split is the pre-condition for Goldman's more blatant illegal conduct.

12. Fox Participation in the Split System

It has always been the petitioner's position that under normal market conditions there is nothing suspect about a distributor preferring a single theater

for the exhibition of its films and vice versa. See Petition for Certiorari p. 7 n. 2. If those were the facts, the authorities in the Fox Brief would be relevant. But these are not the facts.

Here the vertical arrangement between Twentieth Century Fox and Fox Philadelphia is just one part of an elaborate and carefully worked out series of market restrictions designed to divide the market. As shown in Petitioner's Brief pp. 9-10, these two respondents were not passive observers of the split system but actively aided its enforcement. Goldman testified that Twentieth Century Fox notified him when pictures were available that Fox Theatre did not want. R. 1745. Mr. William Moclair, general manager of the Fox Theatre, testified that he notified only Goldman and Stanley Warner, never Viking or the independents, of pictures he intended to pass up—an arrangement reminiscent of Schwalberg. R. 2321-23.[10] Peti-

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[10] Mr. Moclair testified, R. 2323:

"Q. Did you ever have any discussion with George Beattie in which he asked you whether there were any Twentieth Century-Fox films that the Fox Theatre was not interested in?

"A. Yes.

"Q. Can you tell me what the nature of that discussion was, in substance?

"A. If there were an abundance of product, and in most cases they were just minor pictures that I had no interest in going after, I would tell him that.

"Q Did you tell anyone at Stanley Warner that, too?

"A. I did.

. . .

"Q. Did you ever have any similar discussion with any other first-run exhibitor?

"A. Other than Stanley Warner and Goldman, are you asking?

"Q. That's right.

"A. No."

tioner then attempted to prove through Mr. Beattie that he negotiated and obtained only these pictures. R. 1766-68. Mr. Beattie's testimony was blocked by Fox on the ground that Viking had not bid on any Fox pictures played by Goldman. The error of this ruling, however, has already been conceded. See pp. 9-10, *supra*.

13. Respondents' Cited Authority for the Validity of the Split

The respondents have found dictum in *Alexander Milburn Co.* v. *United Carbide & Carbon Corp.*, 15 F. 2d 678, 683-84 (4th Cir. 1926) to the effect that a person cannot be injured when two competitors limit themselves to only a part of the market. The actual holding of the court in *Milburn*, however, was that there was no conspiracy or agreement to divide the market, that the concentration of the two alleged conspirators in separate parts of the market was due to the specialty services provided by one and to extrinsic market factors applying to the other, and that in fact the two alleged conspirators were still trying to break into the other's stronghold. Besides this, the antitrust plaintiff in that case made no attempt to define the total market, to show the market power of each, or to show the relationship between the alleged conspirators, their market position, and plaintiff's injury. Finally, the plaintiff there did not argue the theory and type of economic analysis presented by the petitioner in this case.

14. Respondents' Misconstrue Letter of Department of Justice

In the place of legal argument, the respondents continually stress the position of the Department of Justice as expressed in a letter to counsel for the petitioner. See Appendix to Petitioner's Brief; MGM

Brief pp. 27, 33. The respondents ignore, however, the most crucial condition for [illegible] in this letter, namely that the split of product be *with the consent of all the exhibitors* involved. The Department has never given its approval of a split arrangement unless *all* exhibitors were included.

Moreover, the respondents have already removed all legal significance from their reliance on this letter by acquiescing in *Twentieth Century Fox Film Corp.* v. *Goldwyn, supra* p. 2. For they now concede that a producer would have standing to attack the splits in Alpine and Wichita Falls, Texas, as *per se* illegal.[11]

15. The Split Is Bad for the Motion Picture Industry

The respondents put forward a number of extrajudicial considerations which lead them to argue that the split is good for the motion picture industry. As they put it:

> "The decline in the number of theatres which followed the advent of television, and the consequent decrease in the number of films produced, certainly warrants a distributor's concern for the preservation of as many outlets as possible. Where a split will encourage the overall economic health of exhibitors, and does not deny any exhibitor his competitive opportunities, the distributor is fully warranted, and economically justified, in consenting to such a split." MGM Brief p. 37.

While such altruistic concern by the respondents has superficial appeal, it will not stand analysis.

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[11] In fact, the very California splits to which Assistant Attorney General Stanley N. Barnes referred in the statement found in MGM Brief p. 33 n. 32, were declared illegal in *Goldwyn*.

There are three separate entities involved in the motion picture industry, the exhibitor, the distributor, and the producer. The interests of the producer and the distributor are not the same. In *Goldwyn, supra*, p. 2, the producer released only seven pictures between 1947 and 1950. Thus a substantial drop in the rental caused by splits in the exhibition market significantly affects his mode of operation. Deprived of the revenue which would make possible quality Grade A pictures, the producer must turn to the production of cheaper and quicker Grade B pictures, for at lower profit margins, volume rather than quality is the producer's only alternative. However, for the distributor, volume rather than quality is the key, as the respondents readily admit. As they put it in their brief:

> "The more theatres doing business, the higher a distributor's total income. The distributor has an obvious interest in the economic success of a large number of exhibitor customers." MGM Brief p. 37.

Thus we find that in approving the split, distributors are motivated by self-interest at the expense of the producer and at the expense of quality pictures, rather than by any alleged altruistic concern for the industry.[12]

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[12] Even conceding the respondent-distributors' altruistic remarks, the record in this case contradicts them. The whole purpose of the split, as they describe it, is to protect the independent and marginal exhibitors in the market. But here, only the largest exhibitor chains received the advantages of the market division. Rather than protecting the independents, the restrictions put them in a worse position than if there were in a perfectly competitive market.

The respondents also say that Viking was invited into the split. The first such alleged invitation in August 1956 was a vague suggestion of inclusion by a Stanley Warner booking agent. R. 731-40. Simon Fabian, president of Stanley Warner, stated emphatically that the agent had no authority to even talk of the possibility.

(Continued next page.)

Moreover, the petitioner would suggest even this is shortsighted. The way to compete with television is to produce fewer but better pictures, since Grade B pictures can be seen on television every night of the week. But even if in the distributors' self-interest, volume is more profitable than quality, we can rely on *Goldwyn* for the conclusion that producers do not see their interest as being the same as the distributors.

In summary, respondents in defending splits are saying that it is desirable to violate the antitrust laws for the purpose of securing some advantage for one section or another of the industry. To their arrogation unto themselves of what is necessarily a legislative judgment, petitioner's answer is to repeat once more the admonition of this Court in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 187-88:

> Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397. . . . Since Congress has made that choice, we cannot refuse to sustain a decree because by some other measure of the public good the result may not seem desirable.

R. 120. Moreover, both that offer and any firmer offer of inclusion made by Minsky on behalf of Paramount occurred after Viking's counsel had given notice to the distributors in July 1956 that the present suit was to be filed. R. 974-75.

Besides the questionable circumstances of the alleged offers of inclusion in the split, no satisfactory system has ever been suggested whereby Viking and the independents could be included in a split. Goldman and Stanley Warner had to even up their theaters at three each to make it work between them. And if an exhibitor with a single theater wants to establish a reputation for showing only quality films, he must be in a position to compete throughout the market. The pursuit of such a policy is an exhibitor's legal right in a competitive system as required under the antitrust laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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